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In the Supreme Court of the United States.

JANE JOHNSON

vs.

NEW YORK LIFE INSURANCE CO.

ERROR TO THE SUPREME COURT OF IOWA.

BRIEF FOR PLAINTIFF IN ERROR ON MOTION TO DISMISS AND ON THE MERITS ALSO.

MOTION TO DISMISS DISCUSSED AT PAGE 16.

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JANE JOHNSON, PLAINTIFF IN ERROR,

vs.

NEW YORK LIFE INSURANCE CO.,

BRIEF FOR PLAINTIFF IN ERROR.

ERROR TO THE SUPREME COURT OF IOWA.

THE CASE STATED.

Jane Johnson sued the defendant in the District Court of Iowa for $25,000 on an insurance policy which it issued to her husband, Frank C. Johnson, on the 27th day of December, 1890. The policy was assigned to the plaintiff in 1895, and Mr. Johnson died in September, 1896. The policy provides for the payment of an annual premium of $1,060.00, payable on the 11th day of November in each year. It contains the usual provisions for forfeiture for non-payment of premiums when due. Three annual premiums were passed due, according to the due dates *named in the policy*, when Johnson died. But the plaintiff pleads that it was agreed that the contract of insurance was a New York contract and should be governed and construed by the laws of that state; and answering that allegation of the petition the defendant "admits that in the application

for said policy it was mutually agreed that the contract of insurance issued upon said application should be *governed* by the laws of the State of New York; and avers that it was further agreed in said application that the contract contained in said policy and in said application should *construed* according to the laws of the State of New York, and that the place of said contract was and should be the home office of said defendant, in the City of New York, in the State of New York."

The plaintiff, therefore, *founded* her cause of action and right of recovery upon the laws of New York, and alleged in her petition that when the policy in suit issued, and ever since 1877, there was in force in that state what is there familiarly known to life insurance companies as the "NOTICE LAW." This law she copied into her petition and introduced in evidence at the trial, and it reads as follows:

(Laws of 1877, chap. 321.)

"No Life Insurance Company, doing business in the State of New York shall have power to declare forfeited or lapsed any policy hereafter issued or renewed by reason of non-payment of any annual premium or interest, or any portion thereof, except as hereinafter provided. Whenever any premium or interest due upon any such policy shall remain unpaid, when due, a written or printed notice, stating the amount of such premium, or interest due on such policy, the place where said premium or interest should be paid, and the person to whom the same is payable, shall by duly addressed and mailed to the person whose life is assured, or the assignee of the policy, if notice of the assignment has been given to the company, at his or her *last known* postoffice address, postage paid by the company, or by an agent of such company, or person appointed by it to collect such premium. Such notice shall further state that unless the said premium or interest then due shall be paid to the company, or to a duly appointed

agent or other person authorized to collect such premium, within *thirty* days after the mailing of such notice, the said policy and all payments thereon will become forfeited and void. In case the payment demanded by such notice shall be made within the thirty days limited therefor, the same shall be taken to be in *full compliance* with the requirements of the policy in respect to the payment of said premium or interest, *anything therein contained to the contrary notwithstanding;* but no such policy shall in any case be forfeited or declared forfeited or lapsed until the expiration of thirty days after the mailing of such notice.

"Provided, however, that a notice stating when the premium will fall due, and that if not paid, the policy and all payments thereon will become forfeted and void, served in the manner hereinbefore provided, at least thirty and not more than sixty days prior to the day when the premium is payable, shall have the same effect as the service of the notice hereinbefore provided for."

In an amendment to her petition the plaintiff also plead, and at the trial introduced in evidence, certain decisions of the court of last resort of the State of New York construing and applying this "NOTICE LAW," just quoted, and among these the case of *Baxter vs. Brooklyn Life Ins. Co.*, 119 N. Y. Rep., 450, in which case the Court of Appeals of that state said of this notice law:

"These provisions (of the notice law) are to have full effect, *any condition* to the contrary notwithstanding. There was no proof given at the trial by either party to show whether this notice was served or not. It is obvious that this statute, when imported into the contract, modified its conditions in very material respects. The *duration* and validity of the policy was not then dependent upon payment of the premium on the day named therein, but upon payment within 30 days *after* the notice had been given. The condition upon which the policy can be forfeited, or in any way im-

paired as a subsisting contract of insurance is a failure on the part of the insured to pay the premium within 30 days after notice. * * * * The statute prescribes this notice as a necessary condition of forfeiture, and unless it was served the insured was not in default, because payment within thirty days after notice is to be taken as a *full compliance* with the conditions as to payment of premium. * * * Before the defendant could raise any question in regard to the nonpayment of the August premium, it was necessary for it to show that it had complied with the statute by serving the notice, as this step was essential in order to put the assured in *default*, or to raise any point *based* on his omission to pay the last quarterly premium."

Other decisions of the courts of that state, to the same effect, were also plead and introduced in evidence at the trial; and the plaintiff claimed that this notice law and these decisions, if given effect by the Iowa court, gave her a right to recover, notwithstanding that three annual premiums on the policy were past due, because the company had not complied with this law by sending to the insured the notice. Before commencing the action she tendered to the company the three past due premiums amounting to $3,615.00, but the company refused to receive them.

It appears that in the month of Dec., 1892, and just after Johnson had paid that premium which fell due Nov. 11, 1892, the company issued to him a *supplement* to his policy, the instrument being called by the company an "ACCUMULATION POLICY." Although Johnson signed a written request, on one of the company's blanks, that this supplement be issued to him, still it must be true that the company first proffered it to him, for Johnson, naturally, would know nothing about it unless the company *first* informed him about it; but upon whose suggestion the provisions of the supple-

ment were added to Johnson's policy or the time when the supplement issued was finally deemed of no importance.

This supplement among its other provisions provided as follows: "It is understood and agreed except that as herein *expressly* modified the terms of said policy No. 385048 remain unchanged," and then proceeds to set out certain so-called modifications of the Johnson policy and among these is the following:

"After this Policy shall have been in force three full years, in case of non-payment of any premium subsequently due, and upon the payment within thirty days thereafter of any indebtedness to the Company on account of this policy: (1) the insurance will be extended for the face amount, as provided in the table below; or (2) on demand made within six months after such non-payment of premium due, with surrender of this Policy, paid-up insurance will be issued for the reduced amount provided in said table; or (3) the Policy will be reinstated within the said six months, upon payment of the over-due premium with interest at the rate of five per cent. per annum, if the insured is shown to the company to be in good health, by a letter from a physician in good standing."

This provision is followed by a table in the so-called "ACCUMULATION POLICY" showing the application of the provision just quoted. This table is set out in the Iowa court's opinion hereinafter inserted.

The first defense of the company and the one that ultimately prevailed arises out of and is *based* upon Johnson's failure to pay that premium on the policy which fell due, according to the due dates named in the policy Nov. 11, 1893; and although the company does not allege or claim that it sent the notice provided for in the notice law, already quoted, still it claims Johnson's life term ~~of~~ contract of insurance was forfeit-

ed or lapsed on that day, Nov. 11, 1893, and in lieu of his *life* term of insurance there arose automatically, as it were, without the sending of the notice, the *short* term insurance provided for in the provision just quoted from the supplement. In other words his contract for a life time term of insurance, upon his failure to pay that premium, became "transmuted," as the Iowa court puts it, even though the company did not send the notice, into a short term insurance ending May 11, 1896, and Johnson having lived until Sept. 1896, plaintiff could not recover.

But notwithstanding this defense that no notice was required the company, nevertheless, as a second defense, plead that it had sent a notice but not the notice provided for in the notice law in force when the Johnson policy issued, but claimed that the amended notice law of 1892, which reduced the time for the sending of the notice, from at least *thirty* days to at least *fifteen* days before the due date of the premium, applied to plaintiff's policy although enacted two years *after* the policy issued, and claimed to have sent, under this new or amended law, a notice to Johnson *twenty-seven* days prior to the due date of that premium falling due Nov. 11, 1893. Much testimony was taken as to whether or not even this notice was mailed to Johnson and that fact was, doubtless, a question for the jury.

In the reply the plaintiff, in effect, asserts that, if given proper effect, the notice law secured to her husband and to her, as his assignee, the *right to pay* the premiums overdue on the policy, "anything therein (or in the supplement) contained to the contrary notwithstanding," and pointed out in the reply that these stipulations of the supplement were but provisions of

another insurance law of the State of New York commonly styled the "net reserve law," and that but for the fact that the company procured Johnson to waive the benefits of that law in his policy, as it originally issued, these provisions would have been a part of his policy from the beginning. The reply also denies the applicability of the amended or 1892 notice law to Johnson's policy and on that point pleaded and introduced in evidence a "SAVING CLAUSE," passed at the time the amendment was made, which expressly provides that the change made by the 1892 amendment in the 1877 notice law should not effect rights secured under the prior law, and that, aside from this and on general principles, the amended or 1892 notice law could not apply to the Johnson policy; and the reply also denied the sending even of the notice required by the amended or 1892 notice law, and especially denied that even that notice was sent to Johnson's *last known* postoffice address, and denied generally all new matters of the answer.

The trial court instructed a verdict for the defendant company *solely* on the defendant's first defense, namely, that the notice law of New York should not be given any effect and did not apply to Johnson's policy as modified by the provisions of the supplement, already quoted, and that these supplemental provisions put into the Johnson policy enabled the company to entirely evade the requirements of the New York notice law; and on appeal the Supreme Court of the State sustained the same defense in the following opinion, to-wit: (Italics are ours.)

Waterman, J.—There is but little controversy between the parties as to the facts—none as to the following matters: On December 27, 1890, the defendant

company issued to one Frank C. Johnson its policy of insurance on his life for the sum of $25,000.00. This policy was assigned to plaintiff in the year 1895 and on September 28th, 1896, Johnson died. The annual premium provided for in the contract was $1,060 and it was payable in advance on the 11th day of November in each year. The policy contains the usual provisions for forfeiture in case the premiums are not paid when due. Johnson paid the premium due on November 11th, 1892, and thereafter made no payments. After Johnson's death and on the 20th day of February, 1897, plaintiff *tendered* to defendant the amount of the past due premiums with interest to that date, which it declined to accept. Thereafter this action was brought. The defendant company was duly incorporated under the laws of the state of New York and the policy was issued in that state, and by the terms of the application, the contract was to be *construed by the laws thereof*. It was therefore a New York contract.

Wyman vs. Southard, 10 Wheat, 48, *Bank vs. Hume*, 128 U. S., 195.

2. Plaintiff claims that the policy in suit was not forfeited by the failure of the assured to pay the premiums which became due after November 11th, 1892, and before Johnson's death, for the reason that at and prior to the time of the issuance of such policy, there was in force in the State of New York a statute, (Laws of 1877, chap. 321, sec 1,) which provided:

"No life insurance company doing business in the State of New York shall have *power* to declare forfeited or *lapsed* any policy hereinafter issued or renewed by reason of non-payment of any annual premium or interest or any portion thereof except as hereinafter provided." We shall not set out the law in terms. It is enough to say that after default in order to declare a forfeiture, it requires the company to mail a written or printed notice to the assured at his last known postoffice, stating the amount due and the place where and the person to whom it is payable, and further that if the amount due is not paid within *thirty* days after mailing the notice "the policy and all

payments thereon will become forfeited and void. In case the payments demanded by such notice shall be made within thirty days limited therefor, the same shall be taken to be in *full compliance* with the requirements of the policy, in respect to the payment of said premium or interest, *anything* therein contained to the *contrary* notwithstanding. But no such policy shall in any case be forfeited or *lapsed* until the expiration of thirty days after the mailing of such notice. Provided however that a notice stating when the premium will fall due and if not paid, the policy and all payments thereon will become forfeited and void, served in the manner herein provided, at least thirty and not more than sixty days prior to the day when the premium is payable, shall have the same effect as the notice hereinbefore provided for." In *Baxter vs. Ins. Co.* 119 N. Y. 454, the court, in speaking of this statute and its effects upon a policy of life insurance issued under it, said: "This statute was a part of the contract in question and governed the rights and liabilities of the parties in precisely the same way and to the same extent as if all its terms and conditions had been actually incorporated into the policy." In that case defendant was claiming a forfeiture of the policy for non-payment of the premium when due. It was not shown that the notice required by law had been given. The court continues as follows: "There was no proof given at the trial by either party to show whether this notice (the one required by statute) had been served or not. It is obvious that this statute when imported into the contract modified its conditions in very material respects. The *duration* and validity of the policy are not then dependent upon payment of the premium on the day named therein, but upon the payment within thirty days after the notice had been given. * * * The statute prescribes this notice as a necessary condition of forfeiture and unless it was served, the assured was not in *default* because payment within thirty days after notice is to be taken as a full compliance with the conditions as to payment of premium. * * * Before defendant could raise *any question* in regard to the non-payment of

the August premium, it was neccessary to show that it had complied with the statute by serving the notice, as this step was essential in order to put the insured in default, or to raise any point *based* on his omission to pay the last quarterly premium." See also: *DeFreece vs. Ins. Co.* 136 N. Y. 151; *Phelan vs. Ins. Co.* 113 N. Y. 147. In *Griffith vs. Insurance Company*, 101 Cal. 627, the same statute is considered and the interpretation given it by the courts of New York, is adopted. We do not understand that the general principles announced in these cases are disputed by appellee. Its contention is that they have no application to the contract here involved, because the policy sued upon was, at the request of the assured, converted into a paid-up policy for a fixed term, which term expired before the assured died. Several further defenses are argued, but the conclusion we reach on the one just stated renders it unnecessary that we consider the other.

In order to present intelligibly the points made by the parties, and particularly by appellant, it may be well to say something further as to the statutes of New York on the subject of life insurance and with relation to some other terms of the policy in suit. There was in force in that state, when this contract was made, a statute which we shall style the "net reserve law," giving to holders of life insurance policies, which had been in force three full years, the benefit of the net reserve on their lapsed or forfeited policies, by extending the life of the policy beyond the time of the default in this way: The reserve on such policies, "computed according to the American experience table of morality, at the rate of four and one half per cent per annum, shall on demand made, with surrender of the policy, within six months after such lapse or forfeiture, be taken as a single premium of life insurance at the published rate of the corporation at the time the policy was issued, and shall be applied as shall have been agreed in the application or policy, either to continue the insurance of the policy in force at the full amount, so long as such single premium will purchase temporary insurance for the amount at the age of the insured at the time of the lapse or forfeiture, or to purchase upon the same life at the same age paid up insurance." * * * Laws

1879, Chapter 347, Sec. 1; Laws 1892, Chap. 690, Sec. 88. By the terms of the statutes these provisions could be waived by a proper endorsement on the policy. Such an endorsement was made on the policy in suit in these words: "Notice.—In consideration of the stipulations in case of *lapse*, specified in the policy, the provisions of chapter 347 of the laws of 1879 of the State of New York have been waived in the application for this policy." According to the terms of the original policy in suit in case of lapse or forfeiture thereof, after the payment of three full premiums, the assured was entitled to a paid up policy, the amount of which was to be estimated upon a certain basis as therein stated.

3. We now come to the change made in the contract by which, as appellee claims, it was converted into a non-forfeitable paid up policy for a certain fixed term *On December 10, 1892*, Johnson in writing requested defendant to extend to his policy "the benefits of its accumulation policy." In response to this the company issued and delivered to him a policy, or certificate, the material part of which, so far as concerns the issues here, is in these words:

"NEW YORK LIFE INSURANCE COMPANY,

346 Broadway, New York.

This certifies that in compliance with the request of the legal holders of policy No. 385,048, issued on the life of Frank C. Johnson, the benefits of the ACCUMULATION POLICY plan of the New York Life Insurance Company are hereby extended to said policy as stated on the next page. It is understood and agreed that except as herein *expressly* modified, the terms of said policy No. 385,048 remain unchanged. * * * This policy is not subject to any conditions or restrictions as to travel, residence, occupation or manner of death. * * * After this policy shall have been in force three full years in case of non-payment of any premium subsequently due and upon the payment within thirty days thereafter of any indebtedness to the company on account of this policy: (1) The insur-

ance will be extended for the face amount, as provided in the table below; or (2) on demand made within six months after such non-payment of premium due, with surrender of this policy, paid up insurance will be issued for the reduced amount provided in said table; or (3) the policy will be reinstated within the said six months upon payment of the over-due premium with interest at the rate of five per cent per annum *if* the insured is shown to the company to be in good health by a letter from a physician in good standing.

Table of Guarantees if Payment of Premiums is Discontinued.

Provided there is no indebtedness against the policy.

(Pursuant to the insurance law, Chapter 690, Laws of 1892, of the State of New York.)

If the Premiums are paid	(1) The insurance of $25,000 will be extended.	or (2) The policy may be converted into paid up insurance.
To Nov. 11, 1893,	To May 11, 1896,	or $1825
" " 1894,	" Jan. " 1899,	" 3045
" " 1895,	" Aug. " 1901,	" 4225
" " 1896,	" " " 1903,	" 5250
" " 1897,	" " " 1905,	" 6175

(Here follows extension of table.)

Policies continued in force beyond the Accumulation Period will be entitled, in case of non-payment of any premium subsequently due, to extended insurance or reduced paid up insurance, on the same basis as that on which the above table is constructed."

What was the effect of this new contract? If it *converted* Johnson's policy into a contract for paid up *term* insurance, then no notice was necessary. The notice is for the benefit of the assured. It would avail him nothing when no act of his would enable him to

continue the policy in force. The language of the statute is plain enough on this point. Notice is required only as a basis for declaring a forfeiture or lapse of a policy for non-payment of premium or interest. Where the term expires for which the risk is taken, there is neither a forfeiture or a lapse. Looking now to the language of the accumulation certificate, we find that its provisions were to become a part of the contract between these parties. That the clause of the original policy providing for its forfeiture for the non-payment of premiums, was so far modified and changed that upon such failure, the policy became a paid up contract for the amount of the original insurance for a certain and definite term. On demand of the assured, within a fixed period after default, he was given certain other options; but in default of such demand the term insurance, as stated, took effect. No such demand was made by Johnson. There was no forfeiture of Johnson's *life* contract, as appellee insists. By the terms of the agreement which he made, his life contract, upon his *default* in the payment of the premium due November 11th, 1893, became transmuted into a paid up policy for a term ending May 11th, 1896. But appellant argues that the accumulation certificate gave to the original policy nothing but what was bestowed by the net reserve statute mentioned above, upon all policies in which its benefits are not waived, and that the notice law would apply in such cases; and it is said the benefits of the net reserve statute were not all waived here because of the express reservation in the contract, to which we have referred, by which the assured was entitled upon default to a *paid up policy*.

We do not think the provisions of this net reserve statute had the effect to dispense with the notice, but there is a material distinction, which seems to have been overlooked by counsel for appellant, between the application of the law and of an accumulation certificate to a prior policy. The benefits of that statute were given only to policies which had lapsed or been forfeited for non-payment of premium, debt or interest, and the notice had to be given to effect this forfeiture or fix such lapse. After the default, the life contract

continued in force until it was determined according to the statute. In such case, if the assured died after default but before notice, his beneficiary would be obliged to pay the past due premiums in order to recover. In the case at bar, under the modified contract, *immediately* on default in payment of the premium of 1893, the policy became a paid up contract for a *term*, and if the assured had died within such term, plaintiff could recover without payment of the defaulted premiums. Here, the life contract did not run beyond the default day. No act of the company was necessary to put the term insurance in force; it went into effect by reason of the contract. It is true that plaintiff could have reinstated the life contract on payment of the defaulted premium within six months, and upon proof of health; but he did not do this, and, therefore, the term policy which began immediately upon the default was never altered or annulled. Adopting an illustration of the learned trial judge, if Johnson had died on May 10, 1896, plaintiff could have recovered the full face of this policy without further payment being required of her. But on defendant's theory, if he had died on May 12th, one day after the term had expired, he could still recover, but in order to do so, would have to tender all past due premiums. This payment would thus be required for a single day's insurance. Counsel for appellant responds to this with counter illustration. He does not deny this anomalous feature of the contract as he claims it to be, but says, if Johnson had lived until May 12th, 1896, and then tendered the amount due for the premiums he would have saved his life contract. This, he asserts shows an inconsistency in the interpretation given by the trial court to the contract. As counsel thinks, this was holding that 'the policy was good if Johnson lived, but no good if he died.' Whatever right Johnson had to re-instate the life contract after his default in the payment of premiums, was given him by his new policy. The life policy could have been revived in such case, not because the term insurance had not gone into effect; nor because the character of the contract had not been changed in its terms, but for the reason that by a provision of this

very agreement, the old contract, might under certain circumstances, be made to supercede the new. We do not think he possessed any such right, after the expiration of six months from the time of his default in the payment of the premium. The life contract did not continue alive and in force after such default. A prescribed act, within a certain time, on the part of the assured, was required to give it vitality and this act was never performed. In the meantime without affirmative action of either party the term insurance went into effect. Answering an argument of counsel for appellant we will say that we do not think the accummulation certificate has any added force or virtue because it was *separately* issued. *The contract would have been the same, and the rights of the parties not different, if the terms of that instrument had been incorporated in the original policy.* As counsel construes the notice law, the assured cannot be deprived of the terms most favorable to him, in a policy containing a provision for alternative benefits, without notice being given him. But this is not the law. The notice is required only when it is sought to declare the contract forfeited or lapsed. Neither was done here. We do not regard the waiver in the policy of the benefits of the net reserve law as of any special significance though appellee in argument claims something for it. Our holding would be the same if no such waiver had been made. Our conclusion is that this was a policy for a term that expired before Johnson's death and therefore plaintiff has no right of recovery. The other questions discussed are rendered immaterial by this finding.—Affirmed.

Errors Assigned.

The errors assigned for review here are few and simple; and are: (1) That the Iowa court erred in failing and refusing to give full effect, faith and credit to the statutory provisions and laws of the State of New York, plead and proven in this case; (2) that the court erred in failing and refusing to give that effect to the statutory provisions of the State of New York, which,

by the decisions of the courts of that state, they were shown to have there; (3) that the court erred in holding these statutory provisions of the State of New York, as construed and applied in that state, were not a part of paintiff's contract of insurance, and in holding the contract of insurance forfeitable without the sending of the notice provided for in said New York notice law; (4) that the court erred in not reversing the decision of the trial court and in not awarding judgment and execution to the plaintiff, in that the answer of the defendant company set up no defense to plaintiff's right of recovery, and because the material facts of the case are not in dispute.

As to the Motion to Dismiss. It Involves the Merits.

The motion and brief to dismiss were served upon us May 21, 1902, after we had our brief for hearing on the merits partially printed, having been advised by the clerk that the case would probably be reached for hearing about the first week in ~~June~~ May 1902.

We have permitted the foregoing full statement of the case and the opinion of the Iowa court to remain as printed in anticipation of a general submission, for it seems to us that the nature of the motion to dismiss is such that it requires a full examination of the whole case to determine whether or not this motion should be sustained; and as the case will be reached, as we are advised, for general submission early in the October term nothing will be gained, probably, by submitting the motion independently.

The motion challenges this court's jurisdiction to hear this case on the ground that the Iowa court's decision rests solely on its construction and interpreta-

tion of a statutory provision of New York—the notice law, and no matter how *obviously* erroneous that construction may be this court has no jurisdiction to correct it.

Three of the cases cited by opposing counsel, *Glenn vs. Grath*, *Loyd vs. Mathews*, and *Banholzer vs. Ins. Co.*, do seem to commit this court to that doctrine even as broadly as we have just stated it; but it is worthy of remark that in each of these cases this court proceeded to, at least, review and *examine* the state court's construction of the foreign statute and in each instance the construction seems to have been *right* either as a matter of independent interpretation or it was found to be such as had been given the foreign statute by the courts of the state from which it came. For instance in the latest case cited by opposing counsel, *Banholzer vs. N. Y. Ins. Co.*, 178 N. Y., 402, the Minnesota court's construction of the New York notice law, on the point involved in that case, is seen to have been clearly sustained by the New York court itself in *Conway vs. Ins. Co.*, cited in the Minnesota court's opinion; and so the Minnesota court did give full faith and credit to the legislative enactment of a sister state, as by the Federal Constitution required, by obeying the command of the Federal statute (sec. 905) in giving to it such faith and credit as it was shown to have by law or usage in the courts of the state from which it came.

"Full faith and *credit* shall be given in each state to the public acts, records, and judicial proceedings of every other state." Is this important mandate of the Federal Constitution and the vast rights dependent upon it sufficiently satisfied and obeyed by a state court by permitting a litigant to plead these "public acts"

and introduce them in evidence at the trial of his case and then to entirely ignore them—*make no reference to them*, in its decision of the case, although it be apparent that if they had been given the effect to which they were plainly entitled they would necessarily control the whole case? Would this be questioning or denying the *validity* of such acts within the meaning of the language used in *Glenn vs. Grath*, 147 U. S., 360? Would such a course by a state court give rise to a Federal question which could be reviewed by this court? Could a state court thus purposely, capriciously or arbitrarily, perhaps, eliminate the claimed Federal Constitutional right and question from the case and thus cut off this court's power to extend this constitutional guaranty to every citizen and to his property rights in the courts of all the states? If so this very important constitutional provision *commands* nothing. It amounts to nothing more than a mere invitation to the state courts to recognize it.

In *Des Moines Nav. Company vs. Iowa Homestead Company*, 123 U. S., 555, the defendant set up in the state court as a matter of defense the decree of a Federal Court as being *res adjudicata* of the matters involved in that case, but the state court, for what seemed frivolous reasons, evaded a decision on that point and this court said:

"We can not look upon the reason given by the court below for not considering the question of prior adjudication as sufficient for avoiding the decision of a controlling Federal question, fairly presented by the pleadings, proofs and assignment of errors, and necessarily involved in the determination of the case. That question stood in the very front of the litigation and if decided in favor of the Navigation and Railroad Company, ended the whole matter. To give a judgment

the other way, without *considering* it, was simply to ignore one of the most important elements of the case as it stood in the record. There can be no escape from this conclusion."

In *Chapman vs. Goodnow*, 123 U. S., 548, this court said:

"We are aware that a right or immunity set up or claimed under the Constitution or laws of the United States may be denied as well by evading a direct decision thereon as by positive action. If a Federal question is fairly presented by the record, and its decision is actually necessary to the determination of the case, a judgment which rejects the claim, but avoids all reference to it, is as much against the right, within the meaning of sec. 709 of the Revised Statutes, as if it had been specifically referred to and the right directly refused. But if a decision of such a question is rendered unnecessary by the view which the court *properly* takes of the rest of the case, within the scope of the pleadings, the judgment is not open to review here."

If, on the other hand, the state court not only receives the pleaded foreign statute in evidence, and recognizes its VALADITY, but also proceeds to examine and construe it an interesting question might arise as to what specious paralogy indulged in might support the claim that the state court construed the statute and thus ousted this court of jurisdiction.

The Iowa court does not really attempt to construe the New York notice law. It seems to us that it, in effect, simply ignored the plain provisions of that law.

But a solution of these questions is not really required in this case, for we assume that it will not be denied that where the foreign statute has been given an explicit interpretation and construction by the courts of the state from whence it came and such construc

tion is plead and proven, then whether or not the state court gave the foreign statute that faith and credit which it was thus shown to have in the courts of the state from whence it came, presents a Federal question for review here; unless we continue to reason in a circle and say that if the state court in its opinion indulges in an interpretation of the other state's decisions respecting the statute and thus attempts to construe the *construction* that that would end the litigant's rights and no Federal question would be left for review here.

Now, this notice law was first enacted in 1876, but re-enacted with substantial amendments in 1877. The 1877 act seems to have been the result of experience with the prior act for the act as amended is singularly explicit, comprehensive and free from ambiguity, and yet, as might be expected, the reported cases in New York, as well as elsewhere, show many efforts on the part of insurance companies to evade its requirements.

In 1890, the case of *Baxter vs. Brooklyn Life Insurance Co.*, 119 N. Y., 450, came before the Court of Appeals of that state. In that case the following language is used with respect to this notice law and its effect upon insurance policies generally.

"These provisions (of the notice law) are to have full effect, *any condition* to the contrary notwithstanding. There was no proof given at the trial by either party to show whether this notice was served or not. It is obvious that this statute when imported into the contract, modified its conditions in very material respects. The *duration* and validity of the policy was not then dependent upon payment of the premium on the day named therein, but upon payment within thirty days after the notice had been given. The condition upon which the policy can be forfeited, or in any way

impaired as a subsisting contract of insurance is a failure on the part of the insured to pay the premium within thirty days after notice. * * * The statute prescribes this notice as a necessary condition of forfeiture and unless it was served the insured was not in default, because payment within thirty days after notice is to be taken as a *full compliance* with the conditions as to payment of premium. * * * Before the defendant could raise any question in regard to the non-payment of the August premium, it was necessary for it to show that it had complied with the statute by serving the notice, as this step was essential in order to put the assured in *default* or to raise any point *based* on his omision to pay the last quarterly premium."

This decision was plead and introduced in evidence in the Iowa court as showing the force and effect which the notice law was accorded by the New York courts. The language used can scarcely be called a construction or interpretation of the New York notice law. Indeed, as already stated, the act itself is so clear from ambiguity that it needs no construction; but the purpose, force and effect of the law were explicitly set forth in this Baxter case. Here, for instance, the Iowa court was told that the highest court of the State of New York had held there could be no *default* in the payment of a premium until and unless the insurance company showed affirmatively that it had sent the notice required by this notice law; and yet, start at what point you will, travel any avenue you may choose, you come at last to the point in the Iowa court's opinion that the so-called term insurance took effect *because* there was a default by Johnson in the payment of his premiums. This is the very gist of the Iowa court's decision. That court says:

"There was no forfeiture of Johnson's *life* contract, as appellant insists. By the terms of the agree-

ment which he made, his life contract upon his *default* in the payment of the premium due Nov. 11, 1893, became *transmutted* into a paid up policy for a term ending May 11, 1896."

Although this Baxter case informed the Iowa court that the provisions of the notice law must be given full effect "any condition" in the policy to the contrary notwithstanding, as the law itself plainly says, still that court holds that the insurance company had succeeded in inserting a clause in the policy which rendered the notice law wholly inoperative and inapplicable.

Notwithstanding this Baxter case told the Iowa court that the *duration* of a policy of life insurance issued in New York was not dependent upon the payment of the premium on the days named in the policy, but depended wholly upon payment within thirty days after the notice had been given, still that court held that the policy *terminated* for failure to pay a premium on the due date named in the policy, without the sending of the notice. Notwithstanding that this Baxter case told the Iowa court that the only way in which a life insurance contract issued in New York could be in any way or degree *impaired* as a subsisting contract of insurance was a failure on the part of the insured to pay the premium within thirty days after notice, still that court held that Johnson's insurance contract was impaired,—was changed from a life time contract of insurance to a short term of insurance by his failure to pay a premium on the due dates named in the policy, without the sending of the notice. Notwithstanding that this Baxter case told the Iowa court that although the policy named certain days on which the premium should be paid and provided for a forfeiture if pay-

ment was not made on these dates, yet if the insured made payment within thirty days after the required notice such payment must be taken as a *full compliance* with the provisions of the policy itself as to times of payment, still that court held that if the insured failed to pay on the due dates *named in the policy* he had no right to pay thereafter, and lost his life term of insurance and his contract therefor entirely. Notwithstanding that this Baxter case plainly told the Iowa court that before the company could raise any point of defense *based* on the insured's omission to pay a premium it must show affirmatively that it had served the notice required by this notice law, still the court permitted a defense to prevail which was based directly and wholly upon the insured's failure to pay that premium on the policy which fell due Nov. 11, 1893, according to the due dates named in the policy. What is this defense of term insurance *based* on? There can be no escape from the conclusion that it is based wholly upon Johnson's failure to pay that premium which fell due Nov. 11, 1893. That is where the whole defense starts from. The company says it will not now pay this loss *because* Johnson failed to pay that premium which fell due Nov. 11, 1893, and because of that failure a term insurance commenced which ended May 11, 1896, before Johnson died.

Discussing the effect of the supplement issued to Johnson nearly a year before the Nov., 1893, premium became due, the Iowa court says:

"What was the effect of this new contract? If it *converted* Johnson's policy into a contract for paid up term insurance then no notice was necessary."

At this point in the opinion the thought seemed to

be indulged that after the supplement was issued Johnson did not have a life term of insurance at all; that from that very day he had but a short term insurance contract; that he had no right thereafter *to pay* the premiums on the original policy and thus perpetuate his life term contract of insurance; but when it was pointed out to the Iowa court that the provisions of this supplement were but a compliance with another insurance law of New York originally passed in 1879 (p. 72) called by the Iowa court the "net reserve law" and that Johnson's policy, as it originally issued, would have contained, substantially, the provisions of this supplement had not the company induced him to waive the provisions of that law and that the notice law would apply to such a policy, the Iowa court replies, as follows:

"We do not think the provisions of this net reserve statute had the effect to dispense with the notice, but there is a material distinction which seems to have been overlooked by counsel for appellant, between the application of the law and of an accumulation cetificate to a *prior* policy."

And then near the close of the opinion the Iowa court tells us that "answering an argument of counsel for appellant we will say that we do not think the accumulation certificate has any added force or virtue because it was *separately* issued. The contract would have been the same, and the rights of the parties not different, if the terms of that instrument had been incorporated into the *original policy!*" We are thus first told that because the provisions of the supplement were added to Johnson's policy after it was issued (but nearly a year before he defaulted in the payment of a premium) the notice law and its provisions did not apply to his policy, and in the next breath the court in-

forms us that its decision would have been the same had the provisions of the supplement been inserted in Johnson's policy as it originally issued! This opinion has always appeared an enigma to us. It seems simply one of those opinions—fortunately rare, in which even the highest court of a great state became confused.

Even when counsel for the insurance company sought to attach some importance to the fact that the benefits of the net reserve law of New York (substantially the provisions of the supplement) had been waived in the policy as it originally issued, and then put back into the policy through the medium of this supplement, the Iowa court replied: "We do not regard the waiver in the policy of the benefits of the net reserve as of any special significance through appellee in argument claims something for it. Our holding would be the same if no such waiver had been made;" and yet, as we have just seen, the court informs us on the preceding page that "we do not think the provisions of this net reserve statute had the effect to dispense with the notice."

Of course, the idea here expressed that the enactment of the "net reserve law" in 1879 did not release insurance companies from the duty of complying with the older law—the notice law passed in 1877, is clearly right, for side by side these two laws remained unchanged in the statutes of New York for thirteen years and during all that time both had been given effect and when in 1892 the entire body of the general insurance law of the state was revised and gathered into one act and re-enacted as "THE INSURANCE LAW" (chap. 690, N. Y. Laws, 1892) the notice law, with a modification as to the time of the sending of the no-

tice, and the "net reserve law" were both *re-enacted*. And yet, though this provision of the supplement is but a compliance with the "net reserve law" (and the supplement itself so recites) still, according to the Iowa court's holding, no notice was required to "transmute" (lapse) Johnson's policy from a contract of life term insurance into one which secured to him, substantially, nothing more than this reserve law would have given him had he not waived its application to his policy as it originally issued.

It is asserted in the motion to dismiss that the policy sued upon in this case is unlike the Baxter case policy in that it was "an ordinary forfeitable policy;" that it was not "a *non-forfeitable* policy of term insurance." Neither is Johnson's policy a non-forfeitable policy of term insurance. His policy, like all policies issued under and according to the laws of New York, Massachusetts, Missouri and some other states, is simply an ordinary life term insurance contract with a provision against a forfeiture of the net reserve on the policy in case of a default in the payment of a premium and the consequent forfeiture of his *life* term contract of insurance. Had Johnson not waived the benefits of the 1879 "net reserve law" of New York when his policy originally issued it would have been, in respect to the point now under consideration, just like the policy involved in the Baxter case, except that in the Baxter policy the insured chose, as the law provides he may do, to take for the net reserve on his policy a paid up whole life policy for such a sum as the net reserve would purchase, instead of the other benefit, provided for in the law, extended insurance for such a length of time as the net reserve would carry the original policy; but no

matter which one is chosen the notice law would still apply to the policy.

Although the Baxter case policy is not set out at length in the reported case and, hence, its provisions were not known to the Iowa court, yet inasmuch as the insurance company has stated in its brief to dismiss that the policy was "an ordinary *forfeitable* policy," just to show how near an insurance company can come to stating the exact facts when its interest is better subserved by a misstatement of them, we here set out the Baxter case policy as it has been certified to us by the clerk of the Court of Appeals of New York, to-wit:

EXHIBIT A.

THE BROOKLYN LIFE
INSURANCE (VIGNETTE) COMPANY
OF NEW YORK.

Amount.	Quar. Prem.
$3,000.	$20.97-100.
No. 21,839.	Age, 35 years

BY THIS POLICY OF ASSURANCE

In consideration of the application for this policy, and of each of the statements and agreements made therein, and under the conditions and limitations hereinafter specified, promise to pay to — Maria Matteson, wife of the person hereby insured, for her sole use, if living, and if not living, to the children of said person, or their gurdian for their use, or if there be no such children surviving, then to the Executors, Administrators or Assigns of the person hereby insured, the sum of Three Thousand Dollars, at the office of said Company, in the City of New York, within sixty days after receipt of satisfactory proofs of the death during the continuance of this Policy of Joel J. Matteson, of Bradford, in the County of McKean, State of Pennsylvania.

Subject to the following conditions and limitations:

1st. The quarter annual premium of Twenty Dollars and ninety-seven cents, shall be paid in advance on the delivery of this policy, and thereafter on the Twen-

ty-fourth day of August, November, February and May, in every year, during the continuance of this contract.

2d. If any statement in the application be untrue, or if the insured shall engage in any unlawful occupation, or (unless by written permission of the Company) in any occupation forbidden on the back of this policy, or if he shall be convicted of felony, or in case he shall die in consequence of violating law, or by his own act, whether sane or insane, or from the effects of the intemperate use of stimulants or narcotics, this Company shall not be liable for more than the net reserve for this policy at the time of death, computed according to the American Experience Table of Mortality, with four and one-half per cent compound interest.

3d. *This policy shall be void if any premium or part of a premium be not paid when due; but if such forfeiture shall occur after three full years premiums have been paid, the Company will issue a paid up whole life policy, in accordance with the provisions of Chap. 347, of the Laws of 1879, of the State of New York, provided this policy shall be surrendered, duly receipted, within six months of the date of default in payment of premium, as mentioned above.*

4th. The provisions and requirements printed by the Company upon the back of this policy, are hereby referred to and accepted as part of the contract, as fully as if they were recited at length over the signatures hereto affixed.

But it is specially agreed that if the death of the insured shall take place after three years while this policy is in force, and not in consequence of any unlawful act or forbidden occupation, then in no such case shall the full liability of the Company under this Policy be disputed.

In Witness Whereof, the Brooklyn Life Insurance Company have by their President and Secretary, signed and delivered this contract at the City of New York, in the State of New York this Twenty-fourth day of May, One thousand eight hundred and eighty-four (1884).

WM. DUTCHER,
Secretary.

W. M. COLE,
President.

Printed on the back of said Policy, and referred to therein, is the following provision:

6th. This Policy is a contract, made and to be executed in the State of New York, and shall be construed only according to the laws of that state, and no suit shall be brought against the Company upon this Policy, except in the Courts of that State, or in the Circuit or District Courts of the United States, nor shall any such suit be brought after the lapse of one year from the time when the cause of action accrues.

I, W. H. SHANKLAND, Clerk of the Court of Appeals of the said State of New York, do hereby certify that I have compared the annexed copy of Policy of Assurance, used as an exhibit in the action in this court entitled "John T. Baxter, Respondent, vs. The Brooklyn Life Insurance Company, Appellant," ..... with the printed case used at the argument thereof and now on file in this office, and that the same is a correct transcript therefrom.

In witness whereof I have hereunto set my hand and affixed my official seal, at the City of Albany, this Fifteenth day of August, A. D. 1902.

[SEAL.] W. H. SHANKLAND,
Clerk.

Now, this Baxter policy is as much "non-forfeitable" as Johnson's policy in which the other benefit of the "net reserve law," *extended* insurance, is given, except that Johnson would not, as the company claims, have had to *apply* for the extended insurance within the six months mentioned in the Baxter policy and in the "net reserve law." But granting this exception, could the company evade the requirements of the notice law by simply inserting in its policy that after default in the payment of a premium or, to use the exact language of the supplement, "in case of non-payment of any premium" the provisions of the policy as to extended insurance or paid-up policy, as the case might be, took effect automatically, as it were, and without

request from the insured? Suppose Johnson's policy had provided that "in case of non-payment of any premium" the company, without request from him, would issue to him a paid-up policy for such an amount as the net reserve on his policy, applied as a single premium, would buy, would such a provision dispense with the sending of the notice required by the notice law? Or suppose that the policy provided, as many policies do, that in case of default in payment of any premium, after a certain number have been paid, the company would pay to him in *cash* the net reserve on his policy, without request from him, would such a provision enable the company to escape compliance with the notice law? Or suppose the policy provided that in case of non-payment of any premium, after a certain number had been paid, the company, without request from him, would send him $100 or a railroad ticket to New York City, would this dispense with the sending of the notice? Does the *character* of the benefit stipulate for, after default in the payment of a premium, make any difference as to enabling the company to evade the notice law?

It was amazing to us that any court, at this late day, could be mis-led by the use of this beguiling word "non-forfeitable" boldly stamped on an insurance policy. Ever since the passage of the "net-reserve law" in New York in 1879, and the passage of a very similar law in Massachusetts in 1880, substantially enacted in four or five other states later, insurance companies, *obliged* by these laws to provide for some sort of an application of the reserve or net reserve for the benefit of the insured in case of his default in payment of the regular premiums, have conspicuously branded their policies as

"non-forfeitable." Mr. Bacon, sec. 373, speaking of these policies says:

Many policies are called "non-forfeitable" although, by their terms, so many conditions and limitations are imposed, that the word *means little* except that they are either subject to the Massachusetts law, of which we shall soon speak, or that, after a certain number of premiums are paid, they may be exchanged for paid-up policies or become paid-up by their own terms for a certain percentage of the original amount '

The Notice Law Cannot Be Waived.

But still another case from New York relating to the effect of this notice law on insurance policies there issued was introduced in evidence in the Iowa court, *Rowe vs. Brooklyn Life Insurance Co.*, 16 Misc. Rep., 323, (record, 32) From their observations concerning this case in the motion and brief to dismiss we must assume that opposing counsel have forgotten the purpose for which this case was brought to the attention of the Iowa court. This case (record, 32-33) following *Phinney vs. Mut. Life Ins. Co.*, 67 Fed. Rep., 493, holds the requirements of the New York notice law cannot be *waived*. This point is well settled by authorities, state and federal, all over the country. Among the many cases so holding are, *Griffith vs. N. Y. Life Ins. Co.*, 101 Cal., 627; *Equitable Life Assurance vs. Tremble*, 83 Feb. Rep., 85; *Equitable Life vs. Nixon*, 81 Fed. Rep., 796, and the same doctrine was announced concerning a similrr law in Michigan; *Warner vs. Nat. Life*, 100 Mich., 157.

This court in *Equitable Life Assurance vs. Clements*, 140 U. S., 233, announces the same doctrine with respect to a statute of Missouri regulating the form of

policies and method of commutation in case of default in payment of premiums, in the following language:

"The manifest object of this statute, as of many statutes regulating the form of policies of insurance on lives or against fires, is to prevent insurance companies from inserting in their policies conditions of forfeiture or restrictions, except so far as the statute permits. The statute is not directory only, or subject to be set aside by the company with the consent of the assured; but it is mandatory, and controls the nature and terms of the contract into which the company may induce the assured to enter."

Even in Iowa we find in *Marden vs. Hotel Owner's Ins. Co.*, 85 Ia., 580, the Iowa court held that the provisions of a somewhat similar law could not be waived or *contracted against* by any stipulation in the policy.

Now, if the requirements of the New York notice law cannot be waived by a direct stipulation to that effect in the policy, can a waiver or evasion of the law be accomplished by *indirection*—by putting into the policy a stipulation conferring some benefit on the insured after a default in the payment of a premium? The Rowe case informed the Iowa court that according to "law and usage" in the state of New York the requirements of the notice law could not be waived; and the Baxter case informed the Iowa court that the provisions of the notice law must have full force and effect "anything therein (in the policy) contained to contrary notwithstanding;" but the effect of the Iowa court's decision is that the requirements of the notice law may be waived and that the insurance company can, after all, so construct its policy that the law will have no effect upon it whatever.

During the twenty years this New York notice law has been interpreted and applied by state and federal

courts to life insurance policies made in and governed by the laws of New York, as might be expected, the reported cases show many ingenious contentions and efforts to persuade the courts that its provisions did not apply to this or that kind of a policy, but the courts have steadfastly refused to except any policies from its operation, save those expressly excepted in the law itself. For instance, in *McDougal v. Provident Savings Life Company*, 64 Hun., 515, it is said:

"An ingenius argument has been construed by the defendant's counsel to the effect that this contract does not fall within the provisions of Chap. 321 of the laws of 1877 because it was a contract originally for an insurance for one year only, and that a notice to pay an annual premium was not contemplated by its terms. He fortifies his argument by the assertion that the annual premium which the assured was required to pay was less than the amount that would have been required by the ordinary policies issued upon the life of insured persons, but, as it seems to us, the particular form of this policy is unimportant, providing it appears from the whole instrument, as we think it clearly does, that there was an intention on the part of the contracting parties that the insurance should be *continued until the death* of the assured, providing he fulfilled *his* part of the agreement in respect to the payment of the premiums. It was not competent under this contract, for the defendant, at any time, to terminate the agreement, except under the provision in respect to impaired health through the use of stimulants and narcotics, which provision does not concern the case in its present aspect. On the contrary it was in the *power* of the insured to *continue* the contract by the payment of the annual premium. Under these circumstances, we do not see but that this is, in effect, the ordinary insurance contract entered into by insurance companies organized and doing business in this state. One of which the defendant is shown to be. No scheme, however ingenious, can be devised by an insurance agent which the courts can permit to be successful in eluding

the provisions of this most reasonable statute, which requires notice to the assured 30 days before his premium falls due."

This McDougal case was reversed by the Court of Appeals in 135 N. Y., 551, on the point that the notice sent was sufficient in form and substance, but the Court of Appeals, in effect, adhered to the doctrine announced in the foregoing quotation as to the applicability of the New York notice law to the policy, and said: "We should hesitate to call in question the applicability of the statute to *any* class of life insurance policies."

Adopting the thought expressed in the opinion in this McDougal case, "the particular form of this (Johnson's) policy is unimportant, providing it appears from the whole instrument, as we think it clearly does, that there was an intention on the part of the contracting parties that the insurance should be continued *until the death* of the assured, providing he fulfilled his part of the agreement in respect to the payment of the premiums." Can any lawyer doubt that it was the intention of the defendant company, as well as of Johnson, even after the supplement issued, that his insurance should be continued until his death, providing he fulfilled his part of the contract and paid the annual premium. Why, the letter (record, 67) which transmitted to Johnson the supplement extending to his policy the benefits of really nothing more than the "net reserve law," as already shown, and which supplement had been arranged for, as this letter shows, in December, 1892, (it is dated January 20, 1893), nearly a year before he defaulted in the payment of a premium, expresses the hope, on behalf of the company, that Johnson will now *continue* to pay the premiums on the policy for the next "seven years at least."

The payment of seven more annual premiums would have brought Johnson to a period in the life of his policy where he might exchange his policy for $10,570 and certain dividends, as is shown by other provisions of this supplement (record, 16–17) and so, the company expresses the hope in sending the supplement that he would continue the policy at least until that period was reached, but, strange as it may seem the Iowa court reaches the conclusion that at the time he accepted this supplement he *then* and thereby unconditionally contracted for a term of insurance commencing November 11, 1893, and ending May 11, 1896. This is the final thought of the Iowa court expressed in the last lines of its opinion. Clearly if this was so Johnson would have had no contract right to pay even the very next premium and though he tendered it on the very day it fell due, according to the due dates named in the policy, Nov. 11, 1893, the company could have legally refused to receive it, for Johnson, according to the Iowa court's view, had no contract on which he could *continue to pay* premiums after he accepted the supplement! If on the other hand his contract right to pay the annual premiums and thus perpetuate his policy even until his death remained to him after he accepted the supplement, pray tell us how he lost this right—the right to pay, without the company sending the notice and making a demand for the premiums, for the notice law and the Baxter case says if he paid within thirty days after the *demand* for payment contained in the notice such payment must be taken as a full compliance with the terms of the policy respecting the times of payment. And if the company, not having sent the notice, could not legally refuse the premium if tendered the next day

after Nov. 11, 1893, then there never came a time up Johnson's death when he did not possess the right to pay these past due premiums. It was a contract right which his assignee or he possessed when he died.

Of course, the company does not and cannot claim that the notice law was not a part of Johnson's policy *before* the supplement issued. Not only must this be admitted, but even if the provision of the supplement relating to extended insurance, etc., in case of "non-payment" (default) of a premium had been inserted originally in the policy, still the notice law would have become a part of the policy (the Iowa court to the contrary notwithstanding) for there would even then have been a period of, at least, 3 years during which time these provisions would not apply at all in case of a default.

Now, if as we see, the notice law was a part of Johnson's policy before the supplement issued to him as fully as though its terms were written into the policy (the Baxter case) then even the very terms of the supplement retain the notice law as a part of the policy for it says (record, 16) "that except as herein *expressly* modified the terms of said policy No. 385048 remain unchanged." If then before the supplement issued the terms of Johnson's policy concerning the times of payment of premiums provided that *demand* must be made for them by a thirty days notice and if paid in response to this demand that that would be a full compliance with the contract, there is nothing in the supplement which even attempts to take away or even modify, expressly or otherwise, these terms of his policy.

Nor does it matter that the language of the sup-

plement says (record, 17) that in case of "non-payment" of a premium its benefits will attach for, if the notice law be retained as part of the policy, "non-payment" means not paying in response to the demand required to be made. And this is just where the fundamental fallacy in the Iowa court's opinion lies. That court assumed that there could be a default or "non-payment" which would usher in the benefits of the supplement without any demand for the premiums as the notice law provides, notwithstanding that the Baxter case plainly said there could be no *default* in the payment of a premium until the notice was sent nor could the company defend on any point or ground *based* on a failure to pay a premium until it proved it had made the demand,—had sent the notice.

Of course, the Iowa court's holding is without a precedent anywhere and we dare say that it was as much a surprise to the defendant company, and to New York Life Insurance Companies generally, as it was to us. The company itself did not so construe the notice law or its policy, including the supplement, for it pleads, as already stated, that it sent the notice required by the notice law; but why send a notice and take pains to preserve a copy and file away in the archives of the company an affidavit purporting to show the sending of it on a certain day if the company really believed that no notice was required to forfeit, lapse or "transmute" such policies as *this* into term insurance.

In its opinion the Iowa Court says:

"Adopting an illustration of the learned trial judge, if Johnson had died on May 10, 1896, (the day before the term insurance expired) plaintiff could have recovered the full face of his policy, without any further

payment required of her. But on defendant's theory, if he died on May 12, one day after the term had expired, she could still recover, but in order to do so, would have to tender all past due premiums. This payment would thus required for a single day's insurance. Counsel for appellant responds to this with a counter illustration. He does not deny this anomolous feature of the contract, as he claims it to be, but says that if Johnson had lived until May 12, 1896, and then tendered the amout due for his premiums, he would have saved his life contract."

The illustration used by the learned trial judge and adopted by the learned Supreme Court entirely ignores the patent fact that the notice law became and remained a part of the policy. It seems to have been assumed by the Iowa court that the "counter illustration" which we have used admitted the trial court's view of Johnson's right to claim the benefit of the extended insurance provided for in the supplement before the company lapsed the policy by sending the notice. Far from it! The "counter illustration" used was calculated to and does, when rightly interpreted, show the fallacy of the trial court's deduction. The illustration was intended to exemplify the idea that on *every* day after Nov. 11th, 1893, up to the time of his death Johnson's right *to pay* the past due premiums continued, the company not having sent the notice, and that if instead of dying on May 10th, the day before the alleged term insurance expired, he had appeared at the company's office on May 12th, the day after the alleged term insurance expired, and tendered the past due premiums the company would have been obliged to receive them and that if this right,— the right to pay on May 12th, 1896, was admitted, if Johnson was then alive, the result of the Iowa court's hold-

ing would then be that the policy was good if Johnson lived but no good if he died.

Let us not forget that when this notice law is read into Johnson's policy, as it has to be, that the policy the provisions of the supplement included, reads, in effect, as though there was written upon it after all its other provisions this clause, to-wit: "This policy shall not be forfeited or declared forfeited or lapsed (transmutted) until the expiration of thirty days after the mailing of the notice required by the New York notice law and a failure of the insured to pay the premium demanded in such notice, *anything* hereinbefore recited to the contrary notwithstanding." Under that stipulation in the policy both parties would secure rights, the insured the right to resist forfeiture or lapse until the notice was sent and the company to refuse to extend the results of the lapse on the policy until it elected to send the notice. *Mich. Mutual Co. vs. Bowes*, 42 Mich., 23. As was said of a somewhat similar law, even by the Iowa court, in *Boyd vs. Cedar Rapids Ins. Co.*, 70 Ia., 325: "The object of the provision is to give the defendant a right to declare the policy suspended, nothing is in fact obligatory, not even the giving of notice of the maturing of the notes, unless the company desires to declare the policy suspended. Viewing the matter in this light, we see nothing inconsist in the Legislature's providing what the company may do as a condition precedent to the exercise of such right. If it does *nothing* the policy simply *remains in force*." And let us not forget that it is not within the power of the insurance company or the insured nor *both* together to waive this New York notice law or enter into a contract of life time insurance which will not have the provisions of

this notice law incorporated into it—*Griffith vs. N. Y. Life*, 101 Cal., 628; *Equitable Life vs. Tremble*, 83 Fed. Rep., 85.

Johnson could not take the benefits secured to him by the provisions of the supplement by simply omitting to pay a premium, the company not having sent the notice. Suppose that on the next day or at any time within six months, after Nov. 11th, 1893, Johnson demanded a paid up policy for the $1825 provided for in the table. Now, to grant that request might then be for the company's benefit and it might not. But let us assume that the company refnsed. Could Johnson, as a matter of contract right, enforce such a demand? Or suppose that one of the benefits to be enjoyed by the insured after lapse was that he should have the privilege of taking out the net reserve in cash, (this is often provided for in case of lapse) and that Nov. 12th, 1893, or thereafter, Johnson demanded that his policy be "transmutted" (lapsed) into its *cash* surrender value, the company could point to the provisions of its policy, the notice law being a part of it, and tell him that it was not ready to staad that result of a lapse of his policy and that it had not elected to lapse it by sending the notice.

The plaintiff, Johnson's assignee, or in case Johnson had not assigned the contract, then his legal representatives, in bringing suit would have to bring it upon the life term policy whether Johnson died before or after May 11th, 1896, for the company, not having sent the notice and thereby elected to put the term insurance in force, the life contract continued. In other words the company continued to carry the *life* term risk and is entitled to recover therefor the life premi-

ums on the open contract and the past due premiums must be paid the company or deducted from the judgment. They were tendered the company before this action was brought.

Singularly enough, on the very day that the Iowa court filed its opinion, April 8th, 1899, the Supreme Court of New York in *Fischer vs. Metropolitan Ins. Co.*, 37 App. Div., 575, reaffirmed the doctrine of the Baxter case, quoting therefrom the language which we have hereinbefore set out, and in the course of the opinion also said:

"The effect of the statute was that after a policy had once been issued, no act of the insured by way of omission to pay the premium could, of itself, work a forfeiture of the policy. So far as it was concerned, the contract was a *permanent* one until some act of the defendant had been done by way of putting an end to it. Therefore, when any one entitled to sue upon it had occasion to bring an action, he was not compelled, as a condition of *making out his cause* of action, to show that the payment of the premiums had continued after the policy had once taken effect."

The Fischer case has since been affirmed by the New York Court of Appeals, 167 N. Y., 178. Now, suppose in the case at bar that the plaintiff had rested her case, as she might have done, with the introduction of the policy only and offered no proof as to a tender of the past due premiums, how was the defendant company to prove its alleged defense that a term insurance commenced some time after the policy was issued and delivered. It could not prove that defense without *first* offering proof of the sending of the notice followed by proof of failure to pay in response to the notice.

It is true that neither this Fischer case nor *McDougal*

vs. Provident Life, 64 Hun., 515, already alluded to and quoted from, were introduced in evidence in the Iowa court; but there is quite enough in the other two cases introduced in evidence, *Baxter vs. Brooklyn Life* and *Rowe vs. Brooklyn Life*, *supra*, to have compelled the Iowa court to hold with the plaintiff's contention if the opinions in these two cases had been heeded and followed, and it seems absurd to contend that they do not reach and control the law as to plaintiff's policy for obviously this policy was one which covered the whole life time of the insured provided he continued to pay the premiums and such being the contract to cut off the right to pay and thus *discontinue* this contract the notice must be sent.

The New York Statute Ignored.

We have already said that the Iowa court simply ignored the New York Statute. Aside from any decision of the courts of New York brought to the attention of the Iowa court, if any heed or consideration had been given to the plain provisions of this New York Statute, the decision of the Iowa court must have been for the plaintiff. As already pointed out, this notice law was enacted in 1877. Doubtless, even then, many insurance policies provided for some benefit to the insured in case his policy was forfeited for failure to pay a premium, or provided for reinstatement within a limited time on certain conditions; and then, as well as now, the policy was said to be "lapsed" when it was in this condition. The word "lapsed," as applied to insurance policies, had, no doubt, already acquired the meaning it possesses today.

But now, the notice law says that no insurance

company shall have power to declare "forfeited or *lapsed*," any policy of life insurance issued after the passage of the act, until the notice be sent. The use of the two terms "forfeited *or* lapsed" in the statute plainly shows that the Legislature intended to attach a distinct meaning to each; and two years later when the "net reserve law" was passed its benefits were extended to any "lapsed" policy as well as to any "forfeited" policy. But the Iowa court, at one point in its opinion, correctly opines that the notice must be sent to lapse a policy in New York so that the benefits of the net reserve law would attach to it; and yet, although the supplement extends to Johnson's policy nothing more, as it states, than these "net reserve law" benefits, still the policy may be "transmutted" in Iowa into these benefits without sending the notice. Lapsing a policy in New York brings the same results as "transmutting" it in Iowa! Is this New York Statute to be evaded by substituting sound for substance?

This Court Should Enter or Order Judgment for the Plaintiff.

If, on the point already argued this court should reach the conclusion that the case should be reversed then we ask that judgment be entered in this court for the plaintiff or that the Iowa court be directed to enter judgment for her; for if the so-called "term insurance" defense cannot prevail then there is no other defense of any merit *plead* or proven. True, as a second defense, the company does plead that it sent Johnson a notice, but not the notice required to be sent by the law in force when Johnson's policy issued in December, 1890—the 1877 notice law. That law, as will be observed (rec-

ord, 8) provides that the notice, if sent before the premium falls due, according to the due dates in the policy, must be sent "at least *thirty* and not more than sixty days prior to the day when the premium is payable."

The company alleges (record, 14) "that at least fifteen and not more than forty-five days prior to the said 11th day of November, 1893, which was the date when, by the terms of said policy, the 1893 annual premium became due and payable, to-wit: on the 16th day of October, 1893" it mailed to Johnson, at his last known postoffice address, a notice warning him that unless said premium was paid by or before Nov. 11th, 1893, his policy and all payments thereon would be forfeited. This, of course, was not the notice called for by the terms of Johnson's contract for, counting out the day upon which it was mailed, (*Hicks vs. Ins. Co.*, 60 Fed., 609,) it gave but *twenty-five* days notice prior to the day upon which the premium was payable, which was insufficient. *Hicks vs. Ins. Co., supra.*

The company, however, contended that this twenty-five day notice was sufficient, on two grounds: First, because, as already pointed out, the notice law of 1877, in force when Johnson's policy issued, was amended in 1892, so as to provide that the notice might be sent "at least fifteen and not more than forty-five days prior" to the day when the premium was payable; and it was contended that notwithstanding this 1892 law (record 12) expressly says that it shall apply only to policies "*hereafter* issued or renewed," and although there was passed, as part of the same act, (record 20-70) a saving clause which, referring to the schedule of laws repealed, says: "The repeal of a law, or any part of it, specified

in the annexed schedule (the 1877 act is in the schedule) shall not effect or impair any act done or right accrued, etc.," still this 1892 act, which took effect October 1st, 1892, applied to Johnson's policy as to the next premium falling due thereon November 11th, 1892, and as to all premiums thereafter.

This contention was based on the ground, as we understood it, that this notice law was purely remedial; but, at least, two courts have since passed upon this precise point and have held to the contrary,—*Germania Life Ins. Co. vs. Peetz*, (Tex.), 47 S. W., 687; *Hathaway vs. Mut. Life Ins. Co.*, 99 Fed., 534. This last case is reversed in 106 Fed., 815, but not on that point.

We are aware that *Rosenplaenter vs. Provident Life Co.*, 91 Fed., 728, affirmed on appeal to the circuit court of appeals in 96 Fed., 721, might be considered an authority in favor of the company's contention here. But it seems to us that in the consideration of the effect of this 1892 act important and controlling points were entirely overlooked by the court in the Rosenplaenter case and, indeed, in the Hathaway and Peetz cases as well. It will be observed that the 1892 act expressly says that it shall apply only to policies issued or renewed *after* its passage. Now, suppose that in this case the company answered, and on trial proved, that it had sent Johnson such a notice as is required by the 1877 act, not less than 30 nor more than 60 days prior to November 11, 1893—say a *fifty* days' notice—would not such a notice have forfeited this policy? If the company had proved the sending of such a notice in this case and the plaintiff had claimed that the 1892 act applied and hence the fifty days' notice was outside the limit the company would, no doubt, make and sus-

tain the claim that the 1892 act did not apply to the plaintiff's policy because it issued before the passage of that act and was, by the very terms of the act, expressly excluded from its operation.

The plaintiff's policy, not being a one year term policy nor issued or renewed after the passage of the 1892 act, it is impossible to apply the provisions of that act to it. And so, as to this policy and all policies like it issued after the 1877 act took effect and before the passage of the 1892 act, the company must send the notice required by the former act, or the court must hold that the repeal of the 1877 act relieved insurance companies of the duty of sending *any notice whatever* in order to forfeit such policies. Clearly this last proposition cannot prevail, for in the enactment of the 1892 law the legislature evinced an intention to still require insurance companies to send notice and not to relieve them from that duty at all even as to the policies theretofore issued. The very terms of the 1892 act make its operation prospective and even though it be deemed that this law is only remedial, still, by its own terms, it confines its remedies to policies issued after its passage and excludes them from policies issued before its enactment, and this, in connection with the simultaneous passage of the saving clause, already alluded to, leaves even the remedial rights of the insurer and all rights of the insured, as to policies issued prior to the 1892 act, undisturbed. Judge Hammond who gives us the first opinion in the Rosenplaenter case, 91 Fed., 728, sixteen years before he delivered this opinion, conceded that even a remedial law may "exclude by its terms or necessary implication" a retroactive effect, in *Larkin*

vs. Saffarans, 15 Fed., 147; and, as already shown, this 1892 act, not by necessary implication, but by the plainest possible terms, excludes its retroactive effect as to, at least, all life term policies issued before its passage and not renewed after its passage. We do not concede, however, that either the 1877 or 1892 acts were remedial laws. They do not effect court remedies on policies at all. It seems to us that they fixed rather contractual rights and obligations. The two New York cases cited by Judge Lurton in his opinion in the Rosenplaenter case, 96 Fed., 726, do not even tend to sustain the proposition that the 1892 act applies to Johnson's policy.

Again and again in the State of New York the language of the Baxter case to the effect that this notice law entered into the contract of the parties contained in the policy as though the very terms of the law had been inserted in the policy has been reaffirmed by the courts of that state.

Second. But the company, conscious of the soundness of this position, sought to convince the Iowa court that this Johnson policy was "renewed" within the meaning of the 1892 act after its passage by contending that because Johnson paid, Nov. 11th, 1892, an annual premium on the policy, after the 1892 act went into effect, therefore, he "renewed" the policy within the meaning of that act. It was thought this position was supported by the case of *Carter vs. Ins. Co.*, 110 N. Y., 15. The precise form of the policy considered in this Carter case is not disclosed by the report of the case, but if it was, in substance, a life term of insurance issued and calculated upon *level life time annual premiums*, then the decision is unsound in principle

and contrary to other decision of the courts New York; for the gist of the opinion in the Carter case is that even a life contract of insurance issued and calculated upon level lifetime annual premiums with a proviso that the contract may be forfeited for non-payment of any annual premium is an insurance contract from year to year only. This is directly contrary to the holding in *Cohen vs. N. Y. Mutual Ins. Co.*, 50 N. Y., 618, and *Sands vs. N. Y. Life Ins. Co.*, 50 N. Y., 632. In the first of these cases, speaking of a policy like the one in suit here, the court said: "This was not a policy from year to year, but an insurance for life, subject to be defeated by the non-performance of the condition prescribed, to-wit, the payment of the annual premiums"; and in the last of these two cases Judge Peckham likens such a policy to a lease of land to become void if the rent reserved be not paid at stated periods. But is a lease for a term of years *renewed* every time an annual rent is paid upon it. This court has many times held that policies, like this Johnson policy, are not contracts from year to year. *McMaster vs. N. Y. Life Ins. Co.*, 183 U. S., 35.

But, at any rate, *Carter vs. Ins. Co., supra*, can have no application to the Johnson policy, for in that case the policy under consideration was issued *prior* to the passage of the 1876-1877 notice law of New York and, hence, did not take that notice law as a part of it and, if it was deemed a contract from year to year, might be said to terminate, *ex vi termini*, each year and to be "renewed" every time a premium was paid upon it; but suppose, as in the case at bar, the policy issued after the passage of the 1877 notice law, then it could not terminate each year, even if the insured had nothing more than the mere right or privilege of renewal, un-

less and until the company sent the notice. This distinction and its effect on this question of "renewal" of policies issued before and after the passage of the 1877 act is pointed out in the opinion in *Germania Life Ins. Co. vs. Peetz*, 47 S. W., 690, on the motion to rehear that case and see *Wyman vs. Ins. Co.*, 45 Hunn., 187, and so the payment of the annual premium by Johnson Nov. 11th, 1892, after the passage of the 1892 act, did not renew his policy at that time, even within the holding of the Carter case, for his policy being subject to the 1877 act did not *end* then unless the notice had been previously sent for that premium and there was no proof of that and no attempt to prove it; and it is fair to indulge the presumption that if any notice was sent by the company as to that premium it was one required by the 1892 act instead of that required by the 1877 act as the company now and here contends that the last act being remedial only applied to Johnson's policy as to all premiums falling due after Oct. 1st, 1892; but we have already shown that such a notice would be inapplicable to and insufficient as to Johnson's policy.

Even if the 1892 Act Be Deemed Applicable to Johnson's Policy the Notice Sent Was Insufficient.

It will be observed that Johnson's policy, after the supplement issued to him, provides (record 17) that a grace of one month will be allowed in the payment of any annual premium falling due after issuance of the supplement, and that "during the month of grace the policy *remains in full force*." Now, the notice (record 47) sent Johnson, as it is alleged, notified him that unless the annual premium of $1060, mentioned in the

notice, was paid by or before November 11th, 1893, "such policy and all premiums thereon will become forfeited." That is to say, he was notified by that notice that unless he paid before or on that day, November 11th, 1893, which was, as we have already shown, but 25 days after the mailing of the notice his policy would be forfeited. This was, in effect, telling him that unless he paid on or before that day he could not pay the premium thereafter. This notice was clearly insufficient even under the 1892 act when the provision of Johnson's policy as to *grace* is taken into consideration. *New York Life Ins. Co. vs. Dingley*, 93 Fed., 153. Even conceding that the 1892 act applies the notice sent was insufficient for still another reason. The 1892 act provides, as was stated in the Dingley case, that the policy shall not be forfeited until the expiration of *thirty* days after the mailing of the notice required by that act and yet the notice told Johnson that his policy, if his premium was not paid, would be cancelled on the 25th day after the mailing of the notice.

THE TESTIMONY IS UNDISPUTED THAT THE NOTICE WAS NOT SENT TO JOHNSON'S LAST KNOWN POSTOFFICE ADDRESS.

The notice sent (record 47) shows that it was addressed to "Frank C. Johnson, Randolph, Iowa" and the witness who claims to have mailed it on the 16th of Oct. 1893, (and this was a question for the jury record 48) swears (record 47) that he addessed it to Mr. Johnson at Randolph. But now, as we have already seen, on May 30th, 1893, (record 67) nearly six months prior to the mailing and addressing of this notice the manager of the defendant company at Omaha, Nebraska,

E. C. Smith, knew that Johnson's address was Omaha "Care of Citizens Bank" at which bank he had a private desk and at which bank his place of business was at that time (record 67-68); and so this manager knew very well that the proper place to address Mr. Johnson in 1893 was Omaha, Nebraska, care of Citizens Bank, and, hence *he* addresses his letters to Johnson accordingly and sends him the supplement in the letter addressed to that address. This then was Johnson's last *known* post office address, for it will scarcely be denied that Smith's knowledge of Johnson's address was the knowledge of the company. *Goodwin vs. Ins. Co.*, 97 Ia., 226. Mr. Smith testifies (record 59) that in 1893 he maintained the company's office in Omaha on the third floor of the N. Y. Life Building and had the title of "Manager" of the company at that point.

And so, we contend that if this court should conclude that this case should be reversed on the insufficiency of the company's first defense—the inapplicability of any notice law to the policy, that there is nothing left, according to the pleadings as they now stand, upon which to order a new trial and that judgment should be entered here ordered in the lower court for the plaintiff for the full amount of the policy, $25,000, with accrued interest according to the rate provided for by the Iowa statutes, 6 per cent, from Jan. 1st, 1897, as asked in her petition, less the amount of the premiums and accrued interest thereon, $3,615 tendered the company before the bringing of this suit at its Home Office in New York on the 20th of Feb., 1897, (record 28).

Very respectfully submitted.

CONSTANTINE J. SMYTH.

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